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IN THE UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

RICHARD C. BARNES,

Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI

LESHER & SCRUGGS

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IN THE UNITED STATES SUPREME COURT

UNITED STATES OF AMERICA
Plaintiff-Appellee,

-vs-

RICHARD C. BARNES,
Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI

Richard C. Barnes, defendant-appellant in the above-entitled matter, hereby petitions the Supreme Court of the United States for writ of certiorari from the opinion of the United States Court of Appeals for the Ninth Circuit in No. 25707, dated August 24, 1970, and bases his petition upon the following facts:

1. Jurisdiction of the United States Supreme Court to hear this matter is invoked by reason of Rule 21 of the Rules of the Supreme Court of the United States and 28 U.S.C. 1254. The judgment sought to be reviewed was the judgment dated January 5, 1970, wherein the

defendant-appellant was found guilty of the offense of violating Title 18, U.S.C. §201(b)(3), attempting to bribe a federal employee, which judgment was based upon a verdict in cause no. CR-69-219-Tucson in the United States District Court for the District of Arizona, entitled United States of America v. Richard C. Barnes, dated December 2, 1969. The defendant-appellant appealed from said verdict and judgment on January 8, 1970, to the United States Court of Appeals for the Ninth Circuit and the judgment was affirmed in the opinion referred to above. The defendant-appellant moved for rehearing from said opinion on September 3, 1970 and the motion was denied on September 22, 1970. The defendant-appellant filed a Motion for Stay of Mandate on September 28, 1970, and an order staying issuance of mandate was rendered by the United States Court of Appeals for the Ninth Circuit on October 1, 1970, directing that said stay of mandate should abide a decision of the United States Supreme Court if a petition for writ of

certiorari is filed on or before October 22, 1970.

2. The questions presented for review are (a) whether or not the Government can charge a defendant with two separate counts which in truth and in fact are concerned with the commission of only one crime; and (b) whether statements made by a defendant to a government official without a "Miranda" warning are admissable against the defendant where the government agents know that a crime has already been committed and they are simply attempting to elicit incriminating statements from the defendant.

3. The constitutional provisions relied upon are the Fourth, Fifth and Sixth Amendments to the Constitution of the United States, which give to the defendant-appellant the right to be free from unreasonable searches and seizures, the right against incrimination and the right to counsel.

4. In the trial court below the defendant-appellant was charged in two counts in an indictment. Count One charged him with offering a

bribe to a government employee on May 26, 1969 and Count Two charged him with giving a bribe to a government employee on June 23, 1969. The bribe which is alleged to have been offered and given was the same bribe and it was the government's evidence that the bribe was offered at one time and given at another.

When the government employees who testified with respect to the giving of the bribe on June 23, 1969 visited the defendant at his farm on that day, they expected a bribe to be offered to them by the defendant. When the money was transferred from the defendant-appellant to the government employee, the two government employees both realized that the defendant had committed a crime. However, they continued to question the defendant and engage him in conversation for a matter of minutes after the money had changed hands and, in fact, elicited further alleged admissions which were used against the defendant at the trial.

5. The jurisdiction of the trial court was invoked by reason of the defendant-appellant having been charged with a violation of a Federal Statute, to wit: 18 U.S.C. 201(b)(3).

6. The writ of certiorari should be granted because the decision of the trial court and of the Court of Appeals decided important questions of federal law, which have not been, but should be, settled by the United States Supreme Court, and also which decided a federal question in a way in conflict with applicable decisions of United States Supreme Court.

A. The decision of the lower courts in permitting the defendant-appellant to be charged in two counts for the same crime has not been decided by the United States Supreme Court, but should be. Although the evidence showed there were two meetings between the defendant-appellant and the federal officers, there was only one alleged bribe involved. If the testimony of the officers is to be believed, the defendant offered a bribe of $100.00 on May 26, 1969 and made a

"downpayment" on it on June 23, 1969. It is obvious that the reason the Government charged two counts rather than one was to have a better chance of obtaining at least one conviction.

At the conclusion of the Government's case, the defendant made a motion which would have compelled the Government to have proceeded either on Count One or Count Two but not on both. This motion was denied. The denial was error and highly prejudicial to the defendant-appellant.

The case closest on point is United States v. Kemler, 44 F.Supp. 649, wherein the District Court held that the statute in question (18 U.S.C. 201) describes only one offense but provides for several ways to commit it. Clearly, there was but one bribe alleged and therefore one crime sought to be punished, but yet the Government charged the defendant-appellant with two separate offenses.

B. Government Agent Dresser testified that he felt the defendant had committed a

crime when the sum of $25.00 was handed to him. Yet, both he and Government Agent Scott continued to interrogate the defendant and allegedly obtained additional admissions from him. Since the evidence was clear that the agents went to the defendant's farm with an expectation that they would be offered a bribe, and in light of the fact that they felt that the crime had been committed when the money was paid to them, it was error to let them continue to testify about further conversations with the defendant which undisputedly took place without any warning to the defendant of his rights under the Fourth, Fifth and Sixth Amendments. There is no question but that the activity of the agents had gone from the "investigatory" stage to the "accusatory" stage as described in Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977, and that therefore a warning was required as set forth in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694.

If the activity of the government agents in this case is condoned, then presumably there would be no limit as to how many times and in what manner the agents could return to the defendant's farm and question him concerning the event in question so long as they did not arrest him. In other words, even though the agents might well believe that a crime had been committed, then under the holding of this case they could continue to interrogate a defendant in an effort to build their case so long as they did not place him in custody. Quite obviously, this holding is contrary to the spirit of both the Escobedo and Miranda cases.

Respectfully submitted,

LESHER & SCRUGGS

By Edward W. Scruggs
Edward W. Scruggs
Attorneys for Defendant-
Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Petition for Writ of Certiorari was deposited in the United States Mail, postage prepaid, and addressed as follows:

Solicitor General
Department of Justice
Washington, D. C. 20530

and

Richard K. Burke, Esq.
United States Attorney
P. O. Box 1951
Tucson, Arizona 85701
Attorney for Plaintiff-Appellee.

DATED this 19th day of October, 1970.

Edward W. Scruggs

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA
Respondent-Appellee,

v.

RICHARD C. BARNES,
Petitioner-Appellant.

No. 25,707

[August 24, 1970]

Appeal from the United States District Court
For the District of Arizona.

Before: BARNES, BROWNING and DUNIWAY, Circuit Judges
BARNES, Circuit Judge:

Appellant was charged in Count One with *offering* a bribe of $100 to two immigration officials on May 26, 1969; and in Count Two with the *giving* of a bribe of $25 to an immigration official on June 23, 1969.

Appellant was convicted on Count Two and acquitted on Count One. He charges as error that the jury's verdicts were inconsistent; that the government split one crime into two counts improperly, that although this appellant was not in custody he was entitled to a *Miranda* type warning; and that the government failed to comply with local Rule 42, setting up a dead-line for notice to counsel of defendant's admissions.

While we may compliment appellant's counsel on the able and imaginative manner in which the alleged errors were urged, (a) we find no inconsistency in the two verdicts; (b) the government's charge of two counts was proper *(United States* v. *Michelson*, 165 F.2d 732 (2nd Cir.), *aff'd* 335 U.S. 469 (1948)); (c) a person is entitled to no warning during the commission of a crime *(Grier*

v. *United States*, 345 F.2d 523, 524 (9th Cir. 1965); *Feldstein* v. *United States*, ... F.2d ..... (9th Cir. decided 6/22/70)); and (d) Rule 42 expressly provides the trial court may excuse compliance with the rule which it here did.

We *Affirm* the conviction.

ARCATA GRAPHICS, SAN FRANCISCO 8-26-70—360

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 881

RICHARD C. BARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Arizona, petitioner, charged in one count with offering a bribe to a federal employee and in a second count with giving a bribe to a federal employee, was convicted on the second count under 18 U.S.C. 201(b)(3); he was sentenced to six months' imprisonment. The court of appeals affirmed (Pet. App.).

Petitioner contends that it was improper for him to be charged with both offering and giving a bribe since the same bribe was offered at one time and given at another.[1] He also argues that statements made di-

[1] Petitioner was charged with offering the bribe on May 26, 1969, and giving the bribe on June 23, 1969.

406-768—70

rectly after he gave the bribe were inadmissible because made without being warned of his rights under *Miranda* v. *Arizona*, 384 U.S. 436.

1. 18 U.S.C. 201(b) reaches "[w]hoever * * * gives, offers, or promises anything of value to any public official * * * with intent * * * to induce [him] * * * to do or omit to do any act in violation of his lawful duty * * *." This provision has consistently been construed as establishing the distinct crimes of offering and giving a bribe, requiring different proof even when parts of a single course of conduct. *United States* v. *Michelson*, 165 F. 2d 732 (C.A. 2), affirmed on other grounds, 335 U.S. 469; *Lunsford* v. *United States*, 200 F. 2d 237 (C.A. 10); *United States* v. *Lubomski*, 277 F. Supp. 713, 716–718 (N.D. Ill.); *United States* v. *Kemmel*, 188 F. Supp. 736, 740 (M.D. Pa.). Consequently, there was no error in charging petitioner in separate counts. See *Blockburger* v. *United States*, 284 U.S. 299, 302. As noted, petitioner was convicted on only the second count.

2. After petitioner had given money to the federal employees (immigration officials), he stated that he wanted them to permit aliens to remain in the United States and work for him even though they had entered illegally (Tr. 33–35; 59–61). The statements were voluntarily made in petitioner's tool shed before his arrest; they were not offered in any custodial or coercive situation to which the *Miranda* principles apply. See *Hoffa* v. *United States*, 385 U.S. 293, 304. In any event, handing money to the federal employees did

not constitute an offense until it was clear that petitioner's purpose was to induce the officials to refrain from performing their lawful duty in preventing an alien's unauthorized presence in the United States. So viewed, petitioner's statements were part of the offense itself. See *Warszower* v. *United States*, 312 U.S. 342, 345–347.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970